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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, APPELLANT

v.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI, AND ANDREW J. YUHAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The District Court rendered no formal opinion. Its order dismissing the indictment, which discloses the grounds of its decision, appears at R. 43–44.

JURISDICTION

The order of the District Court dismissing the indictment was entered on March 28, 1950 (R. 43–44), and the Government's motion to vacate the order of dismissal and for rehearing (R. 45–49) was denied on April 12, 1950 (R. 49–50). The United States filed its notice of appeal to

this Court on May 11, 1950 (R. 50). Probable jurisdiction was noted by this Court on October 16, 1950 (R. 53). The jurisdiction of this Court to review on direct appeal the judgment of the District Court sustaining, prior to the attachment of jeopardy, the defendants' pleas in bar to the indictment is conferred by 18 U. S. C. 3731. See also Rules 37 (a) (2) and 45 (a), F. R. Crim. P.; *United States* v. *Murdock*, 284 U. S. 141, 146–147.

QUESTIONS PRESENTED

1. Whether the prior conviction of Williams under Section 20 of the Criminal Code for depriving certain persons of their constitutional rights under color of law bars his prosecution for perjury, in testifying that he had not beaten those persons, on the ground of double jeopardy.

2. Whether the acquittal of Ford, Bombaci, and Yuhas under Section 20 of the Criminal Code on a charge of depriving certain persons of their constitutional rights under color of law bars their prosecution for perjury, in testifying that they had not seen Williams beat those persons, on the ground that their acquittal is *res judicata* on the issue of the truthfulness of that part of their testimony.

3. Whether the fact that convictions of certain defendants on conspiracy charges under Section 19 of the Criminal Code were set aside on a question of construction of the statute (review of which is now pending before this Court in No.

26) bars their prosecution for perjury based on testimony given at a prior trial on similar charges in which the jury reached no verdict.

STATUTE INVOLVED

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

This is an appeal from an order of the District Court for the Southern District of Florida (R. 43–44) dismissing a 48-count indictment for perjury allegedly committed by the appellees while testifying on their own behalf at a criminal trial in that court (R. 1–22; and see R. 55). The circumstances leading up to the return of this indictment, the nature of its charges, and the grounds on which it was dismissed may be summarized as follows:

1. On November 15, 1948, an indictment in eight counts (R. 30–42) was filed in the District Court for the Southern District of Florida against the four appellees herein—Jay G. Williams, Charles R. Ford, John S. Bombaci, and Andrew J. Yuhas—and two other defendants, Joseph V. Perry and the Dania Supply Company (referred in the indictment as "Lindsley Lumber Co."), a corporation. Count 2 (R. 31–33) charged that on or about March 28, 1947, Williams, Ford, Bombaci, and Perry, acting under color of law, willfully caused one Frank J. Purnell, Jr., to be subjected to deprivation of certain rights, privileges, and immunities secured to him by the Fourteenth Amendment of the United States Constitution, in violation of Section 20 of the Criminal Code of 1909.[1] Specifi-

[1] Section 20 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 52; now 18 U. S. C. 242) provided in pertinent part:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States * * * shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The rights, privileges, and immunities of which Purnell had allegedly been deprived were "the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of

cally, it was charged that these four defendants, being police officers of the city of Miami, Florida,[2] arrested Purnell and took him to a shack on the premises of the Dania Supply Company, where they physically beat and tortured him in order to coerce him to admit guilt of certain alleged thefts of property from the Dania Supply Company and to implicate other persons as participants in the thefts, and for the purpose of "imposing illegal summary punishment" upon him (R. 32–33). The Dania Supply Company and the appellee Andrew J. Yuhas, the "comptroller" of the company,[3] were also named as defendants, being charged as aiders and abettors of the four principal defendants (R. 33).

Counts 4, 6, and 8 (R. 34–36, 37–39, 40–42) were identical with count 2, except that a different victim was named in each count, these additional victims being Chester M. Robinson (count 4), Henry W. Priest (count 6), and John P. Sturniolo (count 8).

Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the state of Florida" (R. 32).

[2] The defendant Ford was described as a regularly employed police officer of the city (R. 32), the other three, Williams, Perry, and Bombaci, as "special police officers under written authority from the Director of Public Safety of the" city (R. 31).

[3] See p. 252 of the record in No. 365, which, by stipulation, is made a part of the record in the instant case (R. 54–55).

Counts 1, 3, 5, and 7 (R. 30–31, 33–34, 36–37, 39–40) charged the same six defendants named in the even-numbered counts with having conspired "to injure, oppress, threaten, and intimidate [the respective victims named in the even-numbered counts] in the free exercise and enjoyment of the rights and privileges" guaranteed to them by the Fourteenth Amendment, in violation of Section 19 of the Criminal Code of 1909,[4] the alleged object of the conspiracy in each instance being the commission of the substantive offense charged in the corresponding even-numbered count.

At the trial of the foregoing indictment, each of the four named victims testified for the Government that he was physically beaten and tortured by the defendant Williams in the shack on the premises of the Dania Supply Company,

[4] Section 19 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 51; now 18 U. S. C. 241) provided in pertinent part:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The rights and privileges, of which, according to the conspiracy counts, the defendants conspired to deprive their victims, were the same rights and privileges of which they did in fact deprive them according to the charges of the substative counts (see fn. 1, *supra*, pp. 4–5).

as charged in the indictment, and that these beatings were inflicted in the presence and view of the other individual defendants—Ford, Bombaci, Perry, and Yuhas (Record, No. 365, pp. 29–32, 55–57, 77–80, 102–105).[5] Williams, testifying on his own behalf and on behalf of his codefendants, denied having beaten any of the victims (*id.*, pp. 214, 215, 218). The other appellees herein—Ford, Bombaci, and Yuhas—also took the witness stand as witnesses on their own behalf and for the defense generally, and denied not only that they themselves had beaten any of the victims (*id.*, pp. 192–196, 203, 261–262), but also denied that they had seen Williams or anybody else beat them (*id.*, pp. 193–196, 202–206, 253–262), though all admitted being present in the shack during the interrogations of at least some of the victims, when, according to the latter, the beatings were inflicted by Williams.[6]

[5] The victims' testimony was thoroughly corroborated, the corroborating evidence including, *inter alia*, the testimony of one Giroux (Record, No. 365, pp. 121–126), who had been named as a defendant in an earlier indictment, to which he had pleaded guilty (*id.* pp. 121, 127–128).

[6] Ford admitted being present during the interrogation of Purnell (Record, No. 365, pp. 191–193), Robinson (*id.*, pp. 195–196), and Sturniolo (*id.*, p. 196), but not during the interrogation of Priest (*id.*, 197). Bombaci admitted being present during the interrogations of Robinson and Sturniolo (*id.*, pp. 204, 206–207) but not during the interrogations of Purnell and Priest (*id.*, pp. 203, 204, 206, 207). Yuhas admitted being present during the interrogations of all four victims (*id.*, pp. 254–260).

The jury found Williams guilty on all four of the substantive counts (2, 4, 6, and 8).[7] His five codefendants—Ford, Bombaci, Perry, Yuhas, and the Dania Supply Company—were found not guilty on those counts (R. 29). The jury reported inability to agree upon verdicts as to all six defendants under the four conspiracy counts (1, 3, 5, and 7) (*ibid.*).[8]

2. On February 25, 1949, the perjury indictment which gave rise to the present proceeding was filed (R. 1–22; and see R. 55). It charged in substance that the appellee Williams gave false testimony under oath when he denied, as a witness on his own behalf and on behalf of his codefendants at the trial of the earlier indictment, that he had beaten and tortured the four victims named

[7] Williams was sentenced to one year's imprisonment on each of these four counts, the terms to run consecutively (R. 43), and his conviction was affirmed by the Court of Appeals for the Fifth Circuit, *Williams* v. *United States*, 179 F. 2d 656, pending on writ of certiorari, No. 365, granted October 16, 1950.

[8] Subsequently, a new indictment, in four counts, was returned against these six defendants, charging them, in substantially the language of the conspiracy counts of the earlier indictment, with having conspired to deprive the four victims in question of their constitutional rights. A new jury convicted all six defendants on all four counts of this new indictment. Four of the defendants appealed to the Court of Appeals for the Fifth Circuit, which, on grounds not relevant to the instant case, reversed their convictions and directed quashing of the indictment as to them. *Williams* v. *United States*, 179 F. 2d 644, pending on writ of certiorari, No. 26, granted October 16, 1950.

in that indictment at the time and place specified therein; and that the other appellees—Ford, Bombaci, and Yuhas—gave false testimony under oath when they denied, as witnesses on their own behalf and for the defense generally at the trial of the earlier indictment, having seen Williams beat and torture the four victims at the time and place specified therein.[9]

[9] The perjury indictment was in 48 counts, twelve against each of the four appellees (see R. 55). Counts 1, 2, and 3 (R. 1–10) charged Williams with falsely testifying that he had not beaten the victim Purnell. (The draftsman of the indictment apparently deemed it necessary or advisable, in order to guard against possible future procedural complications, to split Williams' alleged perjury with respect to Purnell into three counts—one alleging the perjury to have been committed with respect to the count-one conspiracy charge of the earlier indictment, the second alleging the perjury to have been committed with respect to the count-two substantive charge of the earlier indictment, and the third alleging the perjury to have been committed with respect to both those charges. The same procedure was followed in the remaining counts, 4 through 48.) Counts 4, 5, and 6 (R. 11–21) charged Ford with falsely testifying that he had not seen Williams beat Purnell. Counts 7, 8, and 9, and counts 10, 11, and 12 charged Bombaci and Yuhas, respectively, with falsely testifying that they had not seen Williams beat Purnell. The remaining counts—13 through 48—followed the same pattern as the first twelve, differing only in the names of the victims involved (twelve counts naming Robinson as the victim, twelve naming Priest, and twelve, Sturniolo).

In view of the above-described pattern of the various counts of the perjury indictment, it has been stipulated that "Counts 1, 2 and 3 are typical of all 12 counts against appellee Williams and counts 4, 5 and 6 against appellee Ford are typical of the remaining counts against him and the counts

On March 28, 1950, pursuant to motions filed by the appellees (R. 22–27; and see R. 50–51), the District Court dismissed the perjury indictment (R. 43–44). The order of dismissal explains the grounds of the decision as follows (R. 44): (1) Since the appellee Williams was tried and convicted of the substantive offenses of depriving the four named victims of their constitutional rights by beating and torturing them in order to extract confessions, to try him now for perjuriously denying at his trial that he inflicted the beatings in question "would constitute double jeopardy"; (2) since the appellees Ford, Bombaci, and Yuhas were tried and acquitted, both as principals and as accessories, of the substantive offenses of depriving the four named victims of their constitutional rights by beating and torturing them in order to extract confessions, to try them now for perjuriously denying at their trial that they had seen Williams beat the victims is foreclosed by the principle of *res judicata*, because "'[w]hether they had seen or observed Williams beat the victims was a part and parcel of the charge against them in the substantive counts"; (3) since the Court of Appeals for the Fifth Circuit directed the quashing of the conspiracy indictment which superseded the conspiracy counts of the earlier indictment, in re-

against appellees Bombaci and Yuhas. In order to simplify the record and avoid repetition, it is further stipulated that only counts 1–6, inclusive, need be printed" (R. 55).

spect of which the jury had been unable to reach verdicts (see *supra*, p. 8, and fn. 8), "there was no jurisdiction or right to try the [appellees] on the conspiracy counts [of the earlier indictment], and the counts in this perjury indictment based on the conspiracy counts * * * are bad." [10]

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[10] The order of dismissal reads in pertinent part as follows (R. 44):

"First I shall discuss the counts in this indictment dealing with the substantive counts in case No. 7279. Williams has been convicted on the substantive counts in said case No. 7279. It is the beating of the victims by Williams that was involved in the substantive counts in case No. 7279, on which he was convicted, that is involved in the counts in this perjury indictment with reference to alleged false swearing in case No. 7279. Conviction in this case, No. 7333, would constitute double jeopardy.

"Ford, Bombaci and Yuhas were found not guilty on the substantive counts in case No. 7279. While the defendants Yuhas and the corporate defendant were charged in the substantive counts with aiding and abetting, the defendants Ford and Bombaci could have been found guilty under the general law of aiding and abetting. The jury's determination that they were not guilty was a determination of their guilt whether as principals or accessories. Whether they had seen or observed Williams beat the victims was a part and parcel of the charge against them in the substantive counts. Under the case of Ehrlich vs. United States, 145 F. (2) 693, the counts in this perjury indictment based on alleged false swearing in defending the charges contained in the substantive counts in No. 7279 are bad.

"Next I will discuss the counts in this indictment charging perjury in the defense of the conspiracy counts in case No. 7279. Subsequent to the trial in case No. 7279, a new indictment was also found which has four counts under Section 19 (18 U. S. C. Sec. 51), substantially like the four conspiracy counts in case No. 7279. On this last indictment

The Government's motion to vacate the order of dismissal and for rehearing (R. 45–49) was denied (R. 49–50), and this appeal followed.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the appellee Williams' conviction of the substantive offenses of depriving the alleged victims of their constitutional rights under color of law, by beating and torturing them in order to extract confessions, bars his prosecution for perjury in denying that he beat and tortured the victims, on the ground that such prosecution would constitute double jeopardy.

2. In holding that the acquittal of the appellees Ford, Bombaci, and Yuhas of those substantive offenses bars their prosecution for perjury in denying having witnessed the use of brutality by Williams, on the ground that their acquittal constitutes *res judicata* on the issue of the truthfulness or falsity of that part of their testimony.

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each defendant was convicted and sentenced, and Williams, Bombaci, Perry and Ford appealed. The case was reversed and the indictment ordered quashed. Under these circumstances there was no jurisdiction or right to try the defendants on the conspiracy counts in case No. 7279, and the counts in this perjury indictment based on the conspiracy counts in case No. 7279 are bad.

"The indictment in this case is dismissed as to all defendants."

On review under the Criminal Appeals Act (18 U. S. C. 3731), this Court has considered itself precluded from review of anything but the precise questions decided by the trial court. *United States* v. *Celestine*, 215 U. S. 278, 283.

3. In holding that the subsequent quashing of the conspiracy charges precluded prosecution of the appellees for perjury for false testimony given at their trial on the conspiracy charges.

4. In dismissing the perjury indictment.

SUMMARY OF ARGUMENT

1. Since the doctrine of double jeopardy applies only where the offense of which the accused is charged is identical in law and in fact with an offense for which he has already been tried, Williams was not subjected to second jeopardy by being prosecuted, following his conviction of beating the alleged victims, for perjuriously denying at his trial that he had done so. The offenses were plainly distinct.

2. The jury's acquittal of Ford, Bombaci, and Yuhas of beating the alleged victims, and of aiding and abetting Williams in doing so, was not an adjudication that they did not see Williams in the act of beating them. On the contrary, the jury's conviction of Williams was the equivalent of a finding that Ford, Bombaci, and Yuhas testified falsely in denying that they saw Williams inflict brutality in their presence. The dismissal of the perjury indictment against them on the ground of *res judicata* was therefore error.

3. The subsequent decision of the Court of Appeals (challenged by the Government in No. 26) invalidating the superseding conspiracy indictment under Section 19 of the Criminal Code

did not vitiate the jurisdiction of the trial court to try the conspiracy counts of the original indictment. That decision, therefore, even if correct, would not preclude the prosecution of the appellees for perjuries committed at the trial with respect to the conspiracy counts.

ARGUMENT

The effect of the decision of the District Court, if upheld, would be to grant an unwarranted immunity to all defendants in criminal trials who testify falsely. If the defendant be convicted, the conviction would bar a prosecution for perjury on the ground of double jeopardy; if the defendant be acquitted, the acquittal would bar a prosecution for perjury on the ground of *res judicata*. Admittedly, a defendant may claim immunity against self-incrimination under the Fifth Amendment by refusing to testify. However, if he chooses to testify, the oath taken by him has the same meaning as an oath taken by any other witness and he should be subject to the same penalty for false testimony.

I

THE PROSECUTION OF THE APPELLEE WILLIAMS FOR PERJURY IN DENYING AT HIS TRIAL THAT HE BEAT AND TORTURED THE ALLEGED VICTIMS DOES NOT CONSTITUTE DOUBLE JEOPARDY

It has long been settled that the doctrine of double jeopardy applies only where the offense of which the accused is charged is identical in law

and in fact with an offense for which he has already been tried. *Burton* v. *United States,* 202 U. S. 344, 378–381; *Gavieres* v. *United States,* 220 U. S. 338. "It is only an identity of offenses which is fatal." *Pinkerton* v. *United States,* 328 U. S. 640, 644. Here, Williams was tried and convicted of the substantive offenses of depriving certain theft suspects of their constitutional rights under color of law by extorting confessions from them by physical brutality. Plainly, those offenses were not the same as the offenses of which the present indictment accused him, *viz.,* testifying falsely under oath at his trial that he did not physically maltreat the suspects. Consequently, the District Court erred in holding that Williams' prosecution for perjury was barred by the principle of double jeopardy. *Youngblood* v. *United States,* 266 Fed. 795, 797–798 (C. A. 8); *Allen* v. *United States,* 194 Fed. 664, 666–667 (C. A. 4).

II

THE ACQUITTAL OF THE APPELLEES FORD, BOMBACI, AND YUHAS OF THE CHARGES THAT THEY BEAT AND TORTURED THE ALLEGED VICTIMS DID NOT CONSTITUTE AN ADJUDICATION THAT THEY TESTIFIED TRUTHFULLY IN DENYING HAVING WITNESSED THE USE OF BRUTALITY BY WILLIAMS

The acquittal of the appellees Ford, Bombaci, and Yuhas of the substantive offenses of depriving the theft suspects of their constitutional rights under color of law, by beating and tortur-

ing them in order to coerce confessions, did not constitute an adjudication of the issues of fact involved in their instant prosecution for perjury, *viz,* whether they testified truthfully or falsely when they denied having seen Williams strike and maltreat the suspects."[11] As to these appellees, the question is whether the facts testified to and as to which perjury is charged were necessarily adjudicated by the verdicts of acquittal. *Sealfon* v. *United States,* 332 U. S. 575, 578–579.

Where the alleged false swearing is as to a subordinate evidential matter, and not as to a general denial of guilt, it is well settled that the prior acquittal does not bar a prosecution for perjury. *Kuskulis* v. *United States,* 37 F. 2d 241 (C. A. 10); *Lipscomb* v. *United States,* 33 F. 2d 33 (C. A. 8); *Youngblood* v. *United States,* 266 Fed. 795, 797–798 (C. A. 8); see *Chitwood* v. *United States,* 178 Fed. 442 (C. A. 8); *People* v. *Albers,* 137 Mich. 678, 681–684, 100 N. W. 908,

[11] The charge in the indictment was as follows:

"* * * the said defendant CHARLES R. FORD, on said 19th day of January 1949, or thereafter, did knowingly wilfully, corruptly, feloniously and falsely depose and say in substance that the said FRANK J. PURNELL, JR., had not on the 28th day of March, A. D. 1947, in said building or shack aforesaid, in the presence of said CHARLES R. FORD, been struck, bruised, battered, beaten and assaulted by the said JAY G. WILLIAMS and that he, the said CHARLES R. FORD had not at the time and place last aforesaid seen and observed the said JAY G. WILLIAMS in the act of striking, bruising, battering, beating, assaulting and torturing the said FRANK J. PURNELL, JR., * * *" (R. 12–13; see also R. 16, 20.)

909–910.[12] In the case last cited, Albers, after being acquitted of the charge of offering a bribe to a certain city alderman, was tried and convicted of having perjured himself at his trial in denying that he had been sent to the alderman by one De Vries. On appeal, he contended that his acquittal of the bribery was *res judicata* and hence a bar to the perjury prosecution. The Supreme Court of Michigan, in rejecting the contention, said (137 Mich. at 682–684, 100 N. W. at 909–910):

> These cases [*United States* v. *Butler*, 38 Fed. 498 (E. D. Mich.); *Cooper* v. *Commonwealth*, 106 Ky. 909; *Petit* v. *Commonwealth* (Ky.), 57 S. W. 14] are authority for the proposition that an acquittal of a certain charge is a complete defense to a subsequent prosecution for perjury which is based upon the assumption that respondent was guilty of that charge. If this proposition be sound, and it has been denied (see *State* v. *Caywood*, 96 Iowa 367 [65 N. W. 385]; *Hutcherson* v. *State*, 33 Tex. Cr. Rep. 67 [24 S. W. 908]; *People* v. *Sculley*, 3 N. Y. Cr. R. 244), it has no application to this case. It is true that the perjured testimony under consideration was material, because it strengthened respondent's claim that he was not acting corruptly. But its falsity is not, legally

[12] For other decisions to the same effect, see annotations at 37 A. L. R. 1291–1292. No decision to the contrary has been found.

speaking, inconsistent with respondent's innocence of the crime of bribery. Because respondent was innocent of that crime, it does not follow that all testimony tending to prove his innocence was true, and that all testimony tending to prove his guilt was false. * * *

* * * * *

"The former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment. The doctrine of estoppel [that is, the conclusiveness of a former judgment] is restricted to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence, and are merely collateral. 'A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue.' *Garwood* v. *Garwood,* 29 Cal. 521." 1 Freeman on Judgments, § 257.

Under the indictment (*supra,* pp. 4–5) and the District Court's charge to the jury (see Record, No. 365, pp. 315, 321–322) in the original prosecution for committing the substantive offenses defined by Section 20 of the Criminal Code, Ford and Bombaci (together with Williams) were charged as principals, and Yuhas as an aider and abettor, in activities constituting violations of the

statute; that is, Ford and Bombaci (and Williams) were charged with detaining and beating the named victims, aided and abetted by Yuhas, in deprivation of the victims' constitutional rights and privileges. The perjury indictment charged Ford, Bombaci, and Yuhas with having sworn falsely when they testified that they had not seen and observed Williams in the acts of striking and beating the victims. The acquittal of Ford, Bombaci, and Yuhas was a finding that they had not engaged in the acts of brutality themselves, or aided and abetted in their performance; but the jury, by acquitting them, did not adjudge that they had not witnessed the infliction of brutality by Williams. They were acquitted, in short, of engaging in the brutal activities either as principals or accessories, but not of observing those activities. It should be noted that the trial court carefully charged the jury that Ford, Bombaci, and Yuhas could not be held guilty as aiders and abettors merely because they were present when the beatings occurred (Record, No. 365, pp. 322, 327–328, 330, 332). Consistently, therefore, with the verdicts of not guilty, those defendants could have been present at the beatings in question. Hence, their acquittals constituted no adjudication on that score. And, for the reasons stated above, the same result would have followed even if the trial court had not given such instructions as to those defendants.

Ehrlich v. *United States*, 145 F. 2d 693 (C. A. 5), upon which the District Court relied (R. 44), is not authority to the contrary, since the decision in that case was predicated upon a finding that the fact testified to, and as to which the perjury was charged, was the very fact which constituted the basis of the original charge upon which the defendant had been acquitted. Hence, that decision is consistent with the general rule enunciated in the cases cited above.[13]

Furthermore, this was a peculiarly inappropriate case for invoking the doctrine of *res judicata* as to the appellees Ford, Bombaci, and Yuhas in respect of the issue of the truthfulness or falsity of their testimony that they did not see Williams beat the victims. For, the same jury which acquitted those defendants of physically maltreating the theft suspects *convicted Williams of doing so.* Plainly, therefore, the jury determined that the suspects were beaten and that Williams did the beating. And since Ford, Bombaci, and Yuhas did not dispute the Government's evidence that they were present in the shack during the interrogations of the victims, when, according to the latter, Williams beat them, but on the contrary admitted being present during the interrogations of at least some of the victims (*supra*, p. 7 and fn. 6), the jury's verdict con-

[13] Moreover, the weight of authority is opposed to the *Ehrlich* decision. The cases are collected at 37 A. L. R. 1291, 1292–1298.

victing Williams was tantamount to a finding that the other appellees testified falsely in denying that Williams used brutality in their presence.

III

THE SUBSEQUENT DECISION OF THE COURT OF APPEALS QUASHING THE CONSPIRACY CHARGES DID NOT PRECLUDE PROSECUTION OF THE APPELLEES FOR PERJURY COMMITTED AT THE TRIAL OF THOSE CHARGES

The subsequent decision of the Court of Appeals invalidating the superseding conspiracy indictment under Section 19 of the Criminal Code[14] (see fn. 8, *supra*, p. 8) did not vitiate the jurisdiction of the trial court to try the conspiracy counts of the original indictment. Even if it be assumed, *arguendo*, that the trial court erred in sustaining the validity of Section 19 as applied in the indictment, its jurisdiction was not divested by the subsequent decision of the Court of Appeals. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 289–295. It has often been held that a subsequent determination of invalidity of a statute upon which an indictment was based, or subsequent determination that the indictment was otherwise insufficient or deficient and hence quashable, does not bar a prosecution for perjury committed at the trial of the indict-

[14] The Government contends that this decision of the Court of Appeals was erroneous. The decision is before this Court for review in No. 26.

ment. *Boehm v. United States,* 123 F. 2d 791, 809 (C. A. 8), certiorari denied, 315 U. S. 800; *State* v. *Rowell,* 72 Vt. 28, 47 Atl. 111; *State* v. *Mandehr,* 168 Minn. 139, 209 N. W. 750; *Kelley* v. *State,* 51 Tex. Cr. 507, 103 S. W. 189. See also *West* v. *United States,* 258 Fed. 413, 416–417 (C. A. 6). Cf. *United States* v. *Kapp,* 302 U. S. 214, 217–218; *Kay* v. *United States,* 303 U. S. 1, 6–7.

CONCLUSION

The District Court's judgment dismissing the indictment is erroneous in all its aspects, and should therefore be reversed.

Respectfully submitted.

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